Supreme Court, U.S.
FILED
JUN 24 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.: 76-1657

EDWIN R. MacKETHAN, Receiver of
NORFOLK SAVINGS AND
LOAN CORPORATION,

Petitioner,

v.

BURRUS, COOTES
and BURRUS, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, Burrus, Cootes and Burrus (hereinafter BCB), hereby oppose the issuance of a Writ of Certiorari to review the December 10, 1976, decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

Petitioner has correctly set forth in the Appendix to his Petition the written opinions of the Courts below. No inference should be drawn from the omission of those oral rulings by the trial court on the issue of jurisdiction. As

pointed out in the July 21, 1976, opinion of the Court of Appeals:

> "By appropriate motions, beginning with pretrial motions to dismiss and for summary judgment and including suitable motions at the end of plaintiff's case, after the taking of evidence had been concluded, and after the jury had returned its verdict, defendants contended that there had not been alleged, and there was never proven, a valid cause of action founded on any federal law or otherwise brought within the jurisdiction of the United States District Court."

537 F. 2d at 1263.

THE JURISDICTION OF THIS COURT

Federal courts lack federal question subject matter jurisdiction in this case because, *inter alia*, the only alleged "securities" involved were ordinary savings accounts and certificates. Should certiorari be granted, this Court should exercise its jurisdiction "merely for the purpose of correcting the error of the lower court in entertaining this suit." *United States* v. *Corrick*, 298 U. S. 435, 440 (1936). See also *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 70 (1939); *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934).

QUESTIONS PRESENTED

Petitioner's presentation of the questions presented does not accurately reflect the circumstances, history, and procedural posture involved in this case. The issues more correctly stated are:

1. Should this case be dismissed for lack of federal subject matter jurisdiction where:

(a) There was no "security" involved within the meaning of the Federal Securities Laws of the United States?

(b) None of the damage claimed arose "in connection with" the purchase or sale of any security?

(c) There was no "use of an instrumentality of interstate commerce or the mails" by defendants in connection with the purchase or sale of a security?

2. Assuming jurisdiction, nevertheless, should the judgment of the Court of Appeals be affirmed[1] because:

(a) The Appellate Court properly allowed defendants credit for payments received by plaintiff from others against whom the same damage was claimed?

(b) The District Court action was barred by *res judicata* and related doctrines?

(c) The District Court action was barred by the statute of limitations?

(d) The plaintiff in the District Court failed to prove scienter?

STATEMENT OF THE CASE

Norfolk Savings & Loan Corporation (hereinafter NSL) was closed on January 2, 1973, and Edwin R. MacKethan was thereafter appointed as Receiver. He contended that a fraud had been perpetrated upon the corporation by its former president, Leon C. Hall, and vice-president, Frank F.

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[1] "A respondent or an appellee may urge any matter appearing in the record in support of a judgment . . . ." *LeTulle* v. *Scofield*, 308 U. S. 415, 421 (1940). See also *Ryerson* v. *United States*, 312 U. S. 405 (1941). These points were fully briefed and argued by both parties in the court below. Only certain issues of jurisdiction and the issue of credit will be discussed herein.

Warren, and filed suit against these alleged principal wrongdoers, *Edwin R. MacKethan* v. *Leon C. Hall, et al.*, Civil Action No. 74-0013-R, alleging, *inter alia*, that they had violated the Federal Securities Laws. The Receiver claimed damages in the amount of Eleven Million Dollars ($11,000,000). This suit against these principal wrongdoers is still pending trial.

In addition to the action against principal wrongdoers, the Receiver brought separate actions against others claiming, *inter alia*, aiding and abetting the principal wrongdoers in the perpetration of the fraud. Those actions filed in the District Court at Alexandria included *MacKethan* v. *Virginia National Bank*, C/A No. 74-203-A; *MacKethan* v. *Landmark*, C/A No. 74-204-A, and the case at bar. In each action the Receiver claimed the same eleven million dollar loss.[2]

The first case tried was *MacKethan* v. *Landmark* which resulted in a verdict for the plaintiff in the amount of Two Million Dollars ($2,000,000). The second, *MacKethan* v. *Virginia National Bank*, resulted in a judgment for the plaintiff in the amount of Four Million Dollars ($4,000,000). In both actions, as in the case at bar, the Receiver claimed that defendants had aided and abetted the principal wrongdoers in causing a loss of between ten and eleven million dollars. As noted by the District Judge in his opinion denying credit, "the testimony in all three actions concerning damages was substantially the same." There was no attempt by plaintiff in any action to have the jury determine those damages caused solely by any defendant or those damages caused during any particular period of time.

[2] In addition to these actions the Receiver filed the following additional actions for the same loss: *MacKethan* v. *Burrus, Coates & Burrus*, Cir.Ct.Norfolk, L-73-1300 (breach of contract malpractice action which resulted in a judgement of $384,150 plus interest which has since been satisfied); *MacKethan* v. *VNB*, Cir.Ct.Norfolk, L-74-541; *MacKethan* v. *Landmark*, Cir.Ct.Norfolk, L-74-540; *MacKethan* v. *Peat, Marwick, Mitchell*, Cir.Ct.Norfolk, L-74-620; *MacKethan* v. *Hall, et al*, Cir.Ct.Norfolk, C-73-960; *MacKethan* v. Commonwealth, et al, United States District Court, Richmond, C. A. No. 74-0013-R.

Subsequent to judgement being entered against Virginia National Bank and Landmark, the Receiver entered into a settlement agreement with these defendants and several of the outside directors of NSL. The Release executed in accordance with the agreement provided in part that, "the undersigned Receiver hereby releases and discharges the Released Parties, and each of them, from any and all claims or demands the Receiver has or may have against the Released Parties, including all claims, *demands, or causes of action asserted in civil actions heretofore instituted by the Receiver against the Released Parties*, ..." (emphasis added). The settlement was for Six Million Dollars ($6,000,000) and was concluded prior to trial of the instant action.

Before trial below the Receiver moved to exclude certain evidence from the jury, including facts pertaining to the other suits, the amounts of damages claimed therein, and the settlement effected. In the Brief supporting this motion Receiver's counsel quoted from *Billiot* v. *Sewart Seacraft, Inc.*, 382 F. 2d 662, 665 (5th Cir. 1967):

> *"If the trial is to a jury, we think that the better procedure is to withhold evidence of the settlement from the jury* which will determine the total damages, if any, caused by Seacraft. The trial judge will deduct from the verdict the settlement payment to arrive at the amount which will adequately compensate the appellant." (emphasis supplied in plaintiff's Brief)

(Vol. I, p. 213)[3]

Plaintiff's motion was granted. (Vol. XXV, p. 45).

Trial of this case resulted in a verdict in favor of the plaintiff in the amount of $1,100,000. In accordance with the rulings on the pretrial exclusionary Motion of Plaintiff, evidence on the prior settlements was presented to the Court

[3] References are to Record on Appeal in the Court Below.

out of the presence of the jury, and the issue of credit was submitted to the Court for determination. Credit was denied by Opinion dated July 27, 1975, set forth at Page A-12 of the Appendix to the Petition for Certiorari.

BCB appealed urging nine errors which would result in the reversal of the judgment below, but not a new trial. By Opinion dated July 21, 1976, the Court of Appeals reversed the District Court, holding that the NSL savings certificates were not securities within the meaning of the Federal Securities Laws; therefore, the Court lacked subject matter jurisdiction. Plaintiff petitioned for a rehearing which was granted, resulting in a new Opinion dated December 10, 1976. The Court of Appeals withdrew its earlier Opinion, but affirmed its judgment reversing the District Court on the ground that defendants were entitled to a credit. Plaintiff again sought rehearing which was denied. The Petition for Certiorari was received by defendants on May 26, 1977. For the reasons set forth below the Petition for Certiorari should be denied.

THE BASIS FOR THE DISTRICT COURT'S JURISDICTION OF THIS ACTION

The only basis of federal jurisdiction alleged in the Complaint was Section 22 of the Securities Act of 1933 (15 U. S. C. §77u[a]) and Section 27 of the Securities Exchange Act of 1934 (15 U. S. C. §78aa). Pendant claims were also alleged but dismissed before trial. This was not appealed. To the extent that Petitioner now attempts to base federal jurisdiction on other statutes, such is improper.

Respondents have contended from the outset that the District Court lacked federal subject matter jurisdiction. Because this is a threshold question which must be met before any other issue raised by the Petition, Respondents feel constrained to discuss it here.

Federal Courts have no jurisdiction over the subject matter of a case under the Securities Exchange Act of 1934 unless the acts complained of were in connection with the purchase or sale of a *"security"* as the term "security" is construed under Section 3(a)(10) of the 1934 Act, 15 U. S. C. Section 78c(a)(10).

This Court has mandated that in considering whether an instrument is a security, "form should be disregarded for substance and the emphasis should be on economic reality." *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837 (1975); *Tcherepnin* v. *Knight,* 389 U. S. 332, 333 (1967). Thus, even if the certificates of investment could be deemed to come literally within one of the categories listed in Section 3(a)(10) — and they do not — that would not be controlling since that section in its introduction requires that initial consideration be given to the "context" of the transaction which generates the instrument.

Attention must first be focused on a description of the certificates of investment and their economic context. The NSL certificates were either fully paid or installment accounts under the partial payment system. Code of Virginia, 1950 as amended, Section 6.1-231. The latter accounts included regular passbook accounts as well as Christmas Club-type special accounts. Perhaps the best description of these accounts is found in the legislative history of the Virginia Industrial Loan Association Law.

A study by the Virginia Legislature, Senate Document No. 12 Reg. Sess. 1950, entitled Virginia Industrial Loan Association Law, supports the conclusion that the NSL accounts are identical to a "savings deposit in a bank."

> "It will be noted that certificate of investment accounts are substantially similar to time deposit accounts in banks. Withdrawals from certificate of investment accounts under the partial payment system are not, and probably cannot lawfully be

made by checks drawn upon an association, but generally the time restrictions on withdrawals are waived and an 'investor' may make withdrawals as readily from an association except for this checking feature, as from a bank. It has been suggested that certificate of investment accounts with industrial loan associations are more nearly analogous to bond sale transactions than they are to time deposit accounts with banks. This may be true as to the sale of fully paid certificates of investment but even as to such sales there is a material difference in that the ordinary bond is a comparatively long term agreement generally secured by specified collateral or receipts, whereas, the ordinary fully paid certificate of investment is payable on notice of 90 days or less and is not secured as bonds generally are. As to the sale of certificates of investment under the partial system constituting 89.25% of the total value of certificate of investment accounts as of December 31, 1948, there is little or no analogy to a bond sale transaction. The latter generally involves the purchase of a promise to pay a fixed sum at a fixed future date which promise cannot be enforced until that date. The promise is generally a long term obligation and, since the purchaser cannot recover the whole or any part of the purchase price from the seller until maturity, or increase the principal amount of that particular contract, the obligation does not involve the keeping of an open account by the purchaser with the seller. The sale of certificates of investment under the partial payment system, to the contrary, involves the keeping of a running account by the 'investor' with the association of amounts placed by the former with the latter from time to time as the former desires, the whole or any part of which may be withdrawn by him at any time, subject generally to 30 days notice,

which notice is generally waived. These running accounts and transactions therein are evidenced by passbooks similar to passbooks furnished depositors in banks, payments to the accounts are referred to in the passbooks as 'deposits' and the accounts are referred to in advertising as 'savings accounts'." *Virginia Industrial Loan Association Law, supra,* at 7.

A further study entitled Report of the Commission to Study Matters Relating to Industrial Loan Associations, H. Doc. No. 3 Reg. Sess. 1960 at p. 7 concluded:

> "A fully paid certificate of investment is similar to a certificate of deposit issued by a bank. Under the installment or partial payment system, the customer opens an account with a relatively small payment and is issued a card or booklet, similar to a passbook issued to depositers by banks. The account bears interest and has the characteristics of a savings deposit in a bank."

The conclusion of these studies that "certificates of investment" are analogous to savings accounts and certificates of deposit is further confirmed by the most recent study which has been commissioned by the Virginia General Assembly. Following the closing of NSL, the General Assembly directed the State Corporation Commission to recommend legislative reform for the regulation of all Virginia financial institutions. In describing the operations of industrial loan associations, the report stated:

> "Industrial loan associations authorized to sell certificates of investment may use both the fully paid and partial payment system. A fully paid certificate of investment is similar to a certificate of deposit issued by a bank. A certificate of investment purchased in installments is similar to a savings account in a bank." *Report of the State Corporation Commission,* S. Doc. No. 8, Reg. Sess. 1974 (Va.)

Certain distinctive features of the NSL certificates of investment relevant to the issue of whether they were securities are:

(1) the return to depositors was set contractually at a fixed rate and was unrelated to the profits of NSL, so that depositors were entitled to interest regardless of whether NSL made or lost money in any given year and such interest would not increase or decrease in relation to the profits of NSL;

(XXVI P. 141-3)

(2) they conferred no voting rights;

(XXVI P. 143)

(3) their value was limited to the face amount plus interest and could not fluctuate as a result of the performance of NSL or market factors;

(XXVI P. 143)

(4) the money which was represented by these accounts was not, under Virginia law, any part of the capital of NSL, (Code of Virginia, 1950 as amended Section 13.1-2) and could not be used for the purpose of capital tests under Virginia statutes (e.g., Code of Virginia, 1950 as amended, §6.1-234);

(5) the relationship between NSL and its depositors was that of debtor and creditor;

(XXVI P. 141-3)

(6) they were not negotiable nor transferable in any way and were assignable only on the books of the corporation;

(XXVI P. 143)

(7) the depositors could withdraw their savings at will; and

(8) they were not securities within the terms of Article 8 of the Uniform Commercial Code. Code of Virginia, 1950, as amended, Section 8.8-102.

Consideration of these facts in light of the tests employed by controlling precedent compels the conclusion that NSL certificates of investment were not securities.

As to the law, analysis of the question here must begin with this Court's decision in *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967), and its recent decision in *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, (1975). In *Tcherepnin*, this Court held withdrawable capital shares in an Illinois savings and loan association to be securities under the 1934 Act. However, every feature of the shares in *Tcherepnin* deemed pertinent to the holding that those shares were securities is absent here.

(1) In *Tcherepnin* the shareholders were not entitled to a fixed rate of return but rather received dividends based on the amount of profits and only when and if management could produce profits, while here, the rate of return on NSL deposits was fixed and totally unrelated to the profits of NSL. The NSL depositors were entitled to fixed interest (not dividends) regardless of NSL's profitability.

(2) In *Tcherepnin* the shares were, pursuant to Illinois law, part of the capital structure of the association, and the association's capital consisted exclusively of such shares, while here the NSL deposits are excluded from capital and NSL's capital was represented exclusively by its stockholders' equity and retained earnings.

(3) In *Tcherepnin*, the power of the shareholders to make voluntary withdrawals was restricted while a holder of an NSL certificate could withdraw his funds at any time.

(4) In *Tcherepnin* each shareholder became a member entitled to vote, while here, no membership or voting rights were conferred by virtue of the NSL deposits.

(5) In *Tcherepnin*, the shares could be transferred by written assignment accompanied by delivery of the shares without going through the associaton, while here, the certificates were not negotiable nor transferable, and were assignable only on the books of NSL.

(6) In *Tcherepnin* the shareholders were not creditors of the association, while the NSL depositors were creditors.

The necessity for finding the features which existed in *Tcherepnin* before an instrument can be held a security was recently, and conclusively, reaffirmed in *United Housing* v. *Forman*, 421 U. S. 837, (1975). There this Court dismissed for lack of subject matter jurisdiction a Rule 10b-5 claim based on the sale of stock in a cooperative housing project, upon finding that the stock was not a security, despite the fact that Section 3(a)(10) expressly includes "stock" within the definition of security.

In reaching the decision in *Forman*, this Court declared:

"These shares have none of the characteristics 'that in our commercial world fall within the ordinary concept of a security.' H. R. Rep. No. 85, *supra*, at 11. Despite their name, they lack what the Court in *Tcherepnin* deemed the most common feature of stock: the right to receive 'dividends contingent upon an apportionment of profits.' 389 U. S. at 339. Nor do they possess the other characteristics traditionally associated with stock: they are not negotiable; they cannot be pledged or hypothecated; they confer no voting rights in proportion to the number of shares owned; and they cannot appreciate in value."

* * *

"[T]he basic test for distinguishing the transaction from other commercial dealings is

> 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.' *Howey, supra*, 328 U. S., at 301.

This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entreprenurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in *Joiner, supra* (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in *Tcherepnin* v. *Knight, supra* (dividends on the investment based on savings and loan association's profits)."

421 U. S. at 851, 2.

The right to receive interest from NSL was not contingent upon an apportionment of profits of the enterprise. No capital appreciation resulting from the development of the common enterprise or participation in its earnings based on profits could be expected, reasonably or otherwise. No other feature commonly associated with a security was present. All factors recognized by *Forman* and *Tcherepnin* as being necessary for finding a security are absent here.

Recent decisions even prior to *Forman* have consistently found that ordinary banking transactions are commercial in nature and thus not investments which involve securities for the purposes of the application of the anti-fraud provisions of the federal securities laws. *C. N. S. Enterprises, Inc.* v.

G. &G. Enterprises, Inc., 508 F. 2d 1354 (7th Cir. 1975), *cert. denied*, 423 U. S. 825 (1975); *McClure* v. *First National Bank*, 497 F. 2d 490 (5th Cir. 1974), *cert. denied*, 420 U. S. 930 (1975), *Bellah* v. *First National Bank*, 495 F. 2d 1109 (5th Cir. 1974); *Thorp Commercial Corp.* v. *Northgate Industries, Inc.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,929 (D. Minn. 1974); *Avenue State Bank* v. *Tourtelot*, 379 F. Supp. 592 (N. D. Ill. 1974); *City National Bank* v. *Vanderboom*, 290 F. Supp. 592 (W. D. Ark. 1968), *aff'd* 422 F. 2d 221 (8th Cir. 1970), *cert. denied*, 399 U. S. 905 (1970). Cf. *Oliver* v. *Bostetter*, CCH Fed. Sec. Law Rep. ¶96,059 (D. Md. 1977).

Thus, for instance, the Fifth Circuit recently held an ordinary certificate of deposit not to be a security. In so holding, it considered significant the fact that the certificates of deposit were commercial in nature, that they lacked the investment character necessary for a finding of a security, and that the holders were not dependent on the skill and efforts of the bank's management since their return was not related to the profits of the enterprise. *Bellah* v. *First National Bank, supra*, 495 F. 2d at 1114-16.

Moreover, NSL's certificates of investment are expressly excluded from the statutory definition since Section 3(a)(10) of the 1934 Act provides that "security" shall not include currency. Bank accounts are perhaps the most common medium in which currency is maintained and it is therefore submitted that a reasonable reading of the federal securities laws requires the conclusion that savings accounts such as the present are currency and thus, excluded from the definition of a security. In other contexts, this Court has recognized that savings accounts have the "quality of moneys" and were not investments. *Philpott* v. *Essex County Welfare Board*, 409 U. S. 413, 416 (1975); *Porter* v. *Aetna Casualty & Surety Co.*, 370 U. S. 159, 161-62 (1962). Indeed, even the Securities and Exchange Commission in its accounting and reporting Regulations S-X considers as "cash and cash items" not

merely cash but also demand and time deposits, and certificates of deposit. *See, e.g.*, 17 C. F. R. §§210.5-02.1, 6-03.1 (1975). Exclusion of savings accounts and certificates from the definition of security as currency is consistent with judicial precedent, *Bellah* v. *First National Bank, supra*, 495 F. 2d at 1114:

> "[A] certificate of deposit issued in exchange for currency is not encompassed within the section [Section 78c(a)(10)] because currency is not a security."

Cf. SEC v. *Fifth Coach Lines, Inc.*, 289 F. Supp. 331 (S. D. N. Y. 1968), *aff'd*, 435 F. 2d 510 (2d Cir. 1970). *See also C. N. S. Enterprises, Inc.* v. *G. &G. Enterprises, Inc., supra*, 508 F. 2d at 1363 (holding a note which served as cash substitute was not a security since the 1934 Act excludes "currency" from its definition of security). Taking a properly realistic view of NSL's certificates of investment, they have the quality of currency and as such are excluded from the definition of a security.

The Receiver in agrument below tried to draw an analogy between the NSL deposits and bonds. That analogy is inappropriate because the deposits are simply not bonds, and also, because bonds, unlike the certificates, are expressly included within the definition of securities under the Act. More fundamentally, the analogy perforce disregards the principal features of bonds which make them securities and which distinguish them from the NSL deposits. Bonds, in a very real sense, are long term investments in an enterprise and their value is dependent upon the profitability of that enterprise. While the return on a bond is fixed, the value of a bond is closely related to the profitability of the enterprise. If a company is successful, a bondholder can reasonably expect profits in the form of capital appreciation. One glance at the financial pages of any newspaper reveals how inexorably intertwined the market value of bonds are with the fortunes

of the enterprise which issues them. Thus, unlike NSL deposits, a bond can and does fluctuate in value, and as a result of such fluctuations which are tied to the profitability of the enterprise, the bondholders profit.

Another obvious distinction—and the one through which the fluctuating value of bonds is manifested—is the negotiability and marketability of the bonds over markets and otherwise. The NSL certificates of investment were *not negotiable or transferable*. Finally, bonds are issued for extended periods of time and cannot be cashed in at the will of the bondholder while an NSL depositor could freely withdraw his savings at any time.

In addition, strong policy reasons require that NSL certificates of investment should not be held to be securities. Consideration of the implications of holding the NSL certificates of investment to be securities demonstrates that extending federal securities law jurisdiction over such accounts would frustrate rather than advance the congressional purpose in enacting the federal securities laws.

If a savings account or something similar to it is a security for one purpose, that same savings account must be a security for all purposes. Utilizing the "touch" test of *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6 (1971), if the savings accounts are securities, federal jurisdiction under the securities laws would exist over every instance in which someone withdrew money out of a savings account to purchase or pay for any item and felt that the item was in some manner misrepresented. For the "fraud" would "touch" upon the "sale" of a security—the withdrawal of money from a savings account.

Every corporate fraud perpetrated on a bank would "touch" the bank's depositors who had "bought" their savings accounts. Even theft by a teller from the petty cash would raise the possibility of a federal securities case. Every

run-of-the-mill embezzlement would invite a federal Rule 10b-5 action. Congress did not intend federal jurisdiction to encompass such instruments. Holding that the cerfiticates of investment of NSL are securities would extend jurisdiction to savings accounts for all purposes. Congress intended that the federal securities laws protect investments in securities and not that the laws regulate virtually every transaction involving the exchange of money. Savings institutions are already subject to substantial state regulation and no need exists further to require the already overburdened federal courts and regulatory agencies to assume such overwhelming and unintended responsibilities.

For the foregoing reasons, the NSL certificates were not securities and the Federal Courts lack jurisdiction.

In addition, the suit was jurisdictionally defective as there was no evidence of any damages which arose *in connection with* the purchase or sale of a security. Petitioner's argument below very simply was that NSL sold "certificates of investment" to depositors, that NSL received money in exchange for those "certificates of investment," and that thereafter the assets of NSL of which the deposited monies were a part were wrongfully diverted by the officers of NSL via embezzlement, insufficiently collateralized loans to corporations in which the officers had an interest, etc.

The District Court summarized the evidence and charged the jury as follows:

> "The security here involved is the certificate of investment issued to an individual depositor, and you are told that this is a security within the meaning of the Federal Securities Law as a matter of law.
>
> "The Norfolk Savings & Loan Corporation received, of course, currency in exchange for the certificates of investment, and Norfolk Savings & Loan Corporation, as a corporate entity, was deceived into

believing it would receive, or retain for its own use, the entire proceeds of those certificates of investment.

"If the corporation was defrauded when its assets of which the deposits were a part were misappropriated, or diverted by its own officers, or even by its own officers and with the concurrence of the directors, the Federal Securities Act protects any person, damaged, where there is a sale of a security, and where fraud is used in connection with that sale or purchase.

"The corporation, Norfolk Savings & Loan Corporation, is such a person protected by the Federal Securities Law, even though the defrauding of it came at the hands of its own officers, or even of its own officers and concurred in by its directors."

(XXXII, pp. 1092-3)

While the "in connection with" issue was not reached by the Fourth Circuit, the Ninth Circuit has dealt with it in *Rochelle* v. *Marine Midland Grace Trust Co. of N. Y.*, 535 F. 2d 523 (9th Cir. 1976), a case identical with the facts in this case as summarized in the charge of the District Court.

Rochelle involved a suit by the reorganization trustee of Sunset International Petroleum Corp. (Sunset) against former officers and directors and an independent CPA, Arthur Young & Co., (Young).

The factual circumstances of *Rochelle* were set forth by the Ninth Circuit at pp. 526-7. While the description is lengthy, its striking similarity to the case at bar justifies our setting it forth herein.

"* * * * Sunset's financial statement for the period ending August 31, 1965, certified by Young on November 12, 1965, reported Sunset's net worth to be in excess of $16,000,000. This 1965 statement was

included in Sunset's 1965 Annual Report, its proxy statement of March 24, 1966, and two S 1 Registration Statements filed with the Securities and Exchange Commission (SEC), effective August 26, 1966. Sunset's September 1966 statement was even rosier. It showed a net worth of more than $18,000,000, with current assets exceeding current liabilities by over $7,500,000. Sunset's financial statement for the period ending September 30, 1966 was certified by Young as of December 1, 1966. All of the roses wilted in 1967. Assets were written down $20,000,000 as of July 31, 1967, although the write down was not published until December 1967, when it was revealed in proxy materials relating to CUC's acquisition of Sunset. At that time Sunset showed an earned surplus deficit of $3,000,000, and a $19,000,000 provision for loss. The 1967 proxy materials also first disclosed to the public that Sunset had unsuccessfully tried to raise operating capital through its 1966 debenture offering, that Sunset's operating capital was exhausted, that it was unable to meet its real property tax obligations, and that it was in default on purchase money loans secured by its real estate.

"The securities involved in this litigation are some of Sunset's debentures. Sunset, as issuer, received full value on the debentures that it publicly sold. On two occasions Sunset repurchased its debentures at a discount; on a third occasion, on September 8, 1966, it reacquired some of its 6¼ percent debentures with a face value of $100,000 at a price of $100,000, then immediately resold them for $80,000. The only loss that it alleges from its dealings in its own debentures is the $20,000 lost on its resale of the debentures acquired on September 8, 1966. It does not contend that resale was below market value. The cumulative financial effect of its acquisition and resale of its

debentures was to reduce Sunset's indebtedness by $805,600 at a cost of $629,200."

(footnotes omitted) 535 F. 2d at 526-7.

In discussing the applicability of the Federal Securities Laws, the Court stated:

"The complaint avers adequate facts to show that the 1965 and 1966 financial statements, included in Sunset's Annual Reports, its proxy statements, and its two registration statements were seriously misleading and that the named officers and directors participated in producing these misrepresentations of its financial condition. Young prepared and certified these financial statements.

"Rochelle's Section 10(b) and Rule 10b-5 action against the defendants reaches swampy territory when we ask whether the manipulative devices, fraud, and claimed breaches of duty were 'in connection with' the purchase or sale of the debentures and whether these activities caused any potentially recoverable damage to Sunset.

"Sunset's securities transactions fall into three categories: (1) Its June 1965 acquisition of its 5 percent debentures with a face value of $600,000 for $450,000, and its September 1966 acquisition of similar debentures with a face value of $105,000 for $79,200; (2) its September 1966 acquisition of its 6¼ percent debentures with a face value of $100,000 for $100,000, and the prompt resale of the same debentures for $80,000; (3) the initial issuance of all of its debentures.

"We agree with the defendants that Sunset cannot base any Section 10(b) or Rule 10b-5 action on the repurchase of its debentures at a discount. Even assuming that the defendants' alleged misconduct

was in connection with these acquisitions, Sunset suffered no loss from them. (*See Foster* v. *Financial Technology, Inc.* (9th Cir. 1975) 517 F. 2d 1068; *Rochez Bros.* v. *Rhoades*, (3rd Cir. 1974) 491 F. 2d 402; *Drachman* v. *Harvey* (2nd Cir. 1972) *(en banc)* 453 F. 2d 722.) We also agree that Sunset had no claim for relief based on its resale of its 6¼ percent debentures in September 1966. The complaint contains no averments attempting to tie in Sunset's resale of these debentures to any wrongful acts or breach of duty by these defendants. Thus, if Sunset sustained a loss on the resale, liability for that loss cannot be fastened on them.

"We turn to the question of whether any claim for relief has been stated against the defendants under the securities laws based on Sunset's issuance of all of its debentures. Each of the defendants asserts that Sunset cannot seek any relief on this series of transactions because Sunset received the full face amount of all debentures issued, from which it realized and used more than $8,000,000. Rochelle admits that Sunset suffered no loss on the issuance of its debentures. *But, he argues, Sunset was nevertheless a loser because the issuance of debentures was part of a larger deceptive scheme by which the defendants created a facade of corporate health when, in fact, Sunset's business was suffering from monetary pernicious anemia.* As Rochelle states in his brief, throughout 1965 and 1966, in furtherance of their scheme, the defendants 'ignored the disastrous cash flow demands of Sunset's real estate projects. Extensive funds obtained from Sunset's debentures and other lenders were expended to satisfy the negative cash flows of various real estate projects, never to be recouped. These expenditures included a huge corporate overhead, including salaries and accounting fees paid to . . . Young . . . service and interest pay-

ments on the real estate projects, and numerous other expenses incurred in the supposed operation and marketing of Sunset's real estate projects. *Simply put, [defendants] purported to maintain a going business when they should have acknowledged a business failure. And, in doing so, they committed a corporate waste.'*

"Rochelle's theory is thus corporate mismanagement, which he has tried to fit within the roomy language of *Superintendent of Insurance* v. *Bankers Life and Casualty Co. ["Bankers Life"]* (1971) 404 U. S. 6, 92 S. Ct. 165, 30 L. Ed.2d 128. Although Section 10(b) was not meant to cover 'internal corporate mismanagement.' '[t]he crux of the present case is that Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor.' (*Id.* at 12 13, 92 S. Ct. at 169, 30 L. Ed.2d at 134). *Bankers Life* was undoubtedly intended to prevent courts from reading the phrase 'in connection with' grudgingly. The Court did not try to describe how close to the securities transaction the mismanagement must be before it is deemed to touch the transaction. No comprehensive definition of these tactile concepts is practicable; rather each alleged scheme must be examined in its own context to determine whether the deception or mismanagement caused injury to persons suing who bought or sold securities and whether the wrongful conduct sullied the 'purity of the security transaction and the purity of the trading process.' (404 U. S. at 910, 92 S. Ct. at 167, 30 L. Ed.2d at 132.) (*See Smallwood* v. *Pearl Brewing Co.* (5th Cir. 1974) 489 F. 2d 579, 592 594—95).) We assume, *arguendo,* that the alleged mismanagement did taint the purity of the marketing of these debentures and that investors who purchased them thereby suffered injury. Rochelle cannot sue for them

because *Caplin* v. *Marine Midland Grace Trust Co., supra,* disables him doing so.

"Nor can Rochelle maintain this action on Sunset's behalf. In this case, the 'in connection with' requirement bleeds into the requirement that the plaintiff suffer some damages. Sunset could not successfully sue because it lost nothing in its capacity as an investor on the issuance of its debentures. It received full value for the securities; that the directors later frittered away the funds on losing real estate ventures does not mean that Sunset suffered a loss compensable under the federal securities fraud laws. The nexus between the securities transaction and the alleged losses due to mismanagement is too attenuated in this case to use as a predicate for Section 10(b) liability. We thus conclude that the district court correctly dismissed Rochelle's Section 10(b) and Rule 10b-5 claims against all of the defendants."
(footnotes omitted and emphasis supplied)

535 F. 2d at 528-9.

In the courts below, Petitioner attempted to bring this action within the ambit of *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. 6 (1971). Petitioner's reading of *Bankers Life* is too broad. If his position is adopted by this Court, then there can be no act of corporate mismanagement or embezzlement which will not give rise to a cause of action under the Federal Securities Laws.

In *Bankers Life,* defendants fraudulently conspired to acquire control over Manhattan Casualty Company by causing Manhattan to sell its treasury bonds and using the proceeds of that sale immediately to cover a check of one of the defendants given to pay for the Manhattan stock.

To be sure, there were other aspects of *Bankers Life* such as the unauthorized endorsement of a certificate of deposit

by the President of Manhattan Casualty which also formed a part of the fraud. However, this Court restricted itself solely to the treasury bond sale in determining jurisdiction stating:

> "Petitioner's complaint bases his single claim for recovery alternatively on three different transactions alleged to confer jurisdiction under §10(b): Manhattan's sale of the Treasury bonds; the sale of Manhattan stock by Bankers Life to Bourne and Begole; and the transactions involving the certificates of deposit. We only hold that the alleged fraud is cognizable under §10(b) and Rule 10b-5 *in the bond sale* and we express no opinion as to Manhattan's standing under §10(b) and Rule 10b-5 on other phases of the complaint."
> (emphasis added)

404 U. S. at n. 10.

Unlike the present case and *Rochelle*, the proceeds of the sale of the treasury bonds in *Bankers Life* were *never received* by the corporation, and the loss to the corporation was the loss suffered *directly* from the non-receipt of such proceeds. "Manhattan was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities." 404 U. S. at p. 10.

Like *Rochelle*, in the present case, even if we accept the proposition that the "certificates of investment" given to depositors were "securities," there was no loss to the corporation from their sale because the corporation actually *received* the proceeds from such sales. The loss to the corporation came later, in transactions unconnected with any sale of securities, when Leon Hall and others engaged in corporate mismanagement or embezzlement of the assets of NSL.

Such corporate mismanagement and waste has never been regarded as giving rise to a cause of action under the Federal Securities Laws. In *Bankers Life* this Court agreed that

"Congress by §10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." 404 U. S. at 12.

Moreover, *Bankers Life* is different from the present case in that the fraud in *Bankers Life* could be traced *directly to the proceeds* of the sale of the bonds, i.e., the fraud in *Bankers Life* was directly focused upon the securities transaction both temperally and in terms of design. The proceeds of the sale were not commingled with other funds of the corporaton and there was no evidence that the loss to the corporation might have been caused by waste and mismanagement of general funds. In the NSL case, however, the proceeds from the deposits were taken in by NSL and mixed with all the other funds of NSL. Losses on bad debts, and legitimate loans depleted these resources even where sound business judgment had been exercised by NSL. It is impossible for the Receiver to trace any of the losses, whether fraudulent or non-fraudulent, to the proceeds of particular deposits. The funds fraudulently taken could just as easily have come from commercial loans by NSL or the sale of NSL assets. Under these circumstances, the relation between the deposits and the fraud was too remote and too speculative to satisfy the "in connection" test if that test is to have any meaning at all.

Other decisions handed down subsequent to Bankers Life have not interpreted it to be as broad in its impact as Petitioner suggested below. In *Haberman* v. *Murchison*, 468 F. 2d 1305, 1313 (2d Cir. 1972), the Court required a connection between the securities transaction and the injury:

> "Appellant's other attempts to fit the facts of this case into a Rule 10b-5 claim are equally without merit. He first argued in the District Court that the purchase by Allegheny of its own securities in the summer of 1962 satisfied the purchaser-seller requirement of *Birnbaum*. How that purchase was induced by appellees' withholding material informa-

tion from Alleghany is not clear. In any event, as the District Court observed, since the market price of those securities almost doubled by January 1963 *Alleghany clearly suffered no injury as a result of that transaction."*
(emphasis added)

Schlick v. *Penn-Dixie Cement Corporation*, 507 F. 2d 374, 381 (2d Cir. 1974) cert. denied 421 U. S. 976 (1975), cited *Bankers Life*, but also expressly noted that *"as a result of the sale*, appellant alleges a loss was sustained.'
(emphasis added)

An excellent illustration of the recognition by the circuit courts of the limitations contained in Justice Douglas's opinion in *Bankers Life* may be found in *Vincent* v. *Moench*, 473 F. 2d 430, 434-435 (10th Cir. 1973). The Court held that the "in connection with" language of Section 10(b) must be construed to require "showing a 'causal connection' between the fraudulent sale of a security and the injury" to invoke federal jurisdiction, and found that the necessary causal connection did not exist:

> "Under the well-pleaded facts, Moench devised a scheme to defraud the plaintiffs. In furtherance of the scheme, he deceptively purchased securities from a third party. The plaintiffs were not a party or privy to this transaction, but they claim to have been injured as a result of the effectuation of the scheme. In the final analysis, we have a scheme, a sale, and an injury, but this does not necessarily spell jurisdiction. The question is whether there is a causal connection between the deceptive sale and the injury to the plaintiffs. *Although the deceptive purchase was*, to be sure, a link in the chain of causation, the plaintiffs' injury was the direct result of corporate mismanagement, not of the deceptive purchase. There was, therefore, no requisite causal connection between the

> deceptive purchase and the plaintiffs' injury. The trial court correctly dismissed the complaint . . ."
> (emphasis added)

473 F. 2d at 435

All of these cases relate very closely to NSL's case against BCB. NSL was not harmed by the sale of certificates of deposit for which it received full face value in cash. Nor was NSL damaged as a purchaser in redeeming its certificates since it paid only the same full face value which it had previously received for them. Rather, NSL's injury was the direct result of corporate mismanagement. See *Rosen* v. *Dick*, CCH Fed. Sec. L. Rep. ¶94,786 at p. 96,605, (S. D. N. Y. 1974).

Strong policy reasons also mitigate against a holding that the "in connection with" test has been met in the present case. As noted in *Rochelle, supra:*

> " * * * Because mismanagement will almost surely affect the value of a corporation's securities, and because internal mismanagement is historically a concern of state law, the expansion of Section 10(b) and Rule 10b-5 liability impinges on state regulation of corporations, *(see Popkin* v. *Bishop* (2d Cir. 1972) 464 F. 2d 714, 720) and may balloon the contours of Section 10(b) far beyond congressional intent. * * *"

535 F. 2d at 529 n. 3.

This concern with broadening the scope of the Federal Securities Laws into areas traditionally left-to-state-regulation has also been expressed in this court in its recent opinion in *Santa Fe Industries, Inc.* v. *Green*, ___ U. S. ___, 97 S. Ct. 1292, 1303-4 (1977):

> "The reasoning behind a holding that the complaint in this case alleged fraud under Rule 10b-5 could not be easily contained. It is difficult to imagine

how a court could distinguish, for purposes of Rule 10b-5 fraud, between a majority stockholder's use of a short-form merger to eliminate the minority at an unfair price and the use of some other device, such as a long-form merger, tender offer, or liquidation, to achieve the same result; *or indeed how a court could distinguish the alleged abuses in these going private transactions from other types of fiduciary self-dealing involving transactions in securities. The result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation.* In addition to posing a 'danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5,' *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 740, 95 S. Ct. 1917, 1927, 44 L. Ed.2d 539 (1975), this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law. Federal courts applying a 'federal fiduciary principle' under Rule 10b-5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system. *Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities particularly where established state policies of corporate regulation would be overridden.* As the Court stated in *Cort* v. *Ash, supra,* 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' 422 U. S. , at 84, 95 S. Ct., at 2091 (emphasis added)

"We thus adhere to the position that 'Congress by

'10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.' *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. , at 12, 92 S. Ct., at 169. There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of §10(b) and Rule 10b-5 to 'cover the corporate universe'."
(footnotes omitted and emphasis supplied)

NSL was periodically examined and its internal corporate affairs regulated by the State Corporation Commission pursuant to the statutory scheme adopted by the Virginia Legislature. Adequate state court remedies are provided for losses occasioned by the mismanagement and corporate waste of its officers and directors. This is evident in that numerous state court cases were instituted by the Receiver of NSL (see footnote 2, *supra)* and the one against BCB has been reduced to judgment and satisfied.

The Federal Courts lack jurisdiction and this case should be dismissed because of the absence of evidence satisfying the "in connection with" requirement.

ARGUMENT

"A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Supreme Court Rules. Contrary to the assertions of Petitioner, the decision of the Court of Appeals is not in conflict with applicable decisions of this Court, is in harmony with other circuits, and has not departed from the accepted and usual course of judicial proceedings. Certiorari should be denied.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is well established that a plaintiff may not recover duplicate damages from concurrent or joint tort feasors. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 349 (1971) and *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964). In *Zenith* this Court stated:

> "Of course, to the extent that the $10,000,000 settlement which Zenith received in return for the 1957 release was understood by the parties to provide compensation for future damages that Zenith anticipated it would suffer during 1959-1963 as a result of the pre-1957 conduct of the Canadian pool, HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959-1963 damages inflicted by all the members of the pool. *It is settled that entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment.* See *Aro Mfg. Co.* v. *Convertible Top Replacement Co., supra,* 377 U.S. at 502-503, (plurality view); *McKenna* v. *Austin, supra,* 77 U. S. App. D. C., at 234, 134 F. 2d at 665; Restatement, Torts § 885(3) (1939); W. Prosser, Torts § 46 (3d ed. 1964)."
> (emphasis supplied)

401 U. S. at 348

In the case at bar the Court of Appeals allowed a credit because "logically there is, apparently, at least a partial overlap between what was covered by the jury verdict in the instant case and by the March 2, 1975, settlement." 545 F. 2d at 1390. The Court went on to state "there seems no rational

ground for supposing that less than $1,100,000 of the $6,000,000 settlement payment applied to the very same damages embraced by the jury's verdict . . . ."

Therefore, the Circuit Court of Appeals did nothing more than apply the principles enunciated by this Court in *Zenith* to prevent a double recovery. This application was consistent with the policy of this Court.

Petitioner's reliance upon *Lovejoy* v. *Murray*, 70 U. S. (3 Wall) 1 (1865) and similar cases is misplaced. Those cases involved damages caused by joint wrongdoers, reduced to judgment against one, which judgment was not satisfied in full. This Court allowed the plaintiff to pursue the other wrongdoers for the balance of his judgment.

In *Lovejoy* this Court ruled that the plaintiff's judgment was not fully satisfied. This is to be distinguished from the case at bar where the Court of Appeals said that the $1,100,000 judgment against BCB was fully satisfied because of the overlap between the damages represented by the verdict and the prior settlement.

II. THE DECISION BELOW IS IN HARMONY WITH OTHER CIRCUITS.

The circuit court case most in point is *Wessel* v. *Buhler*, 437 F. 2d 270 (9th Cir. 1971). In *Wessel* stockholders of a bankrupt corporation filed suit under the Securities Exchange Act of 1934 and Rule 10b-5 against the corporation's President, certain officers and directors and the corporation's independent accountant. All defendants except the President and accountant effected a settlement of the claims asserted against them prior to trial. Upon trial, the lower court had dismissed all claims against the accountant and entered judgment against the President on separate verdicts awarded each stockholder. The lower court acknowledged

the general rule that there should be a credit against the judgments in the amount of settlements made by the other defendants. Due to an error in the application of the fundamental rule, however, the case was remanded for retrial solely on the issue of damages. In essence the Ninth Circuit held that the amount obtained by each plaintiff from the settlement must be deducted from his individual jury award in order to arrive at the judgment to be entered for each plaintiff.

The pertinent portion of the Ninth Circuit's Opinion in *Wessel* follows:

> "Computation of Damages
>
> "We turn to appellants' claim that the district court erred in computing allowable setoffs in reaching the judgment. Appellants agreed with the court's suggestion that the amounts of their settlements with the defendants who compromised before trial should be deducted from any award they received against the remaining defendants. At the request of the court and defense counsel, each appellant submitted a statement of the amount he had received by way of settlement. After the jury returned its separate verdict for each appellant, the court added all of the verdicts together totalling $51,020. From that total the court deducted the total amounts received in settlement by all of the then plaintiffs, $47,000, and awarded a lump sum judgment against Buhler for the difference, $4,020. Despite appellants' objections, the court completely disregarded the facts that many of the then plaintiffs had settled for more than the jury had awarded them, that there was no uniform relationship between the amount of the jury awards and the amount of the settlements, and that there was no connection at all between the amounts awarded to any plaintiff vis-a-vis any other plaintiff.

> "The error in the court's method of computing the set-offs and ultimately the judgment *can be illustrated by a single example:* Appellant Wessel had invested $30,000 in stock purchased in reliance on two of the prospectuses and $23,000 in reliance on the third prospectus. *The jury awarded him $23,000. He had received by way of settlement $9,972.44. Deducting that offset, he should have received judgment for $13,027.56, exclusive of interest and costs."*
> *Wessel,* 437 F. 2d at 283-284.
> (emphasis added)

The same principles enunciated in *Wessel* have been followed in other circuits: *Screen Gems-Columbia Music, Inc.* v. *Metlis and Leban Corp.,* 453 F. 2d 552 (2d Cir. 1972); *Billiot* v. *Sewart Seacraft, Inc.,* 382 F. 2d 662 (5th Cir. 1967); *Gould* v. *American-Hawaiian SS Co.,* 535 F. 2d 761 (3rd Cir. 1976).

These cases are in harmony with the principle that a plaintiff is only entitled to one compensation for his loss. This is particularly applicable to 10b-5 litigation in which, by express statutory provision, a plaintiff is limited to recovery of "his actual damages on account of the act complained of." 15 U. S. C. §78bb(a).

The Fourth Circuit Court of Appeals, having concluded that the actual damages sustained by plaintiff because of the acts of BCB ($1,100,000) had already been compensated by the settlement, correctly decided that defendants were entitled to a full credit.

Petitioner erroneously stated (Petition p. 14) that the Court below implied that a jury should have determined the credit herein. The Court, in point of fact, made no such implication. It simply stated that the jury's verdict was not tailored to special questions regarding whether BCB had participated in the pre-1971 fraud, 545 F. 2d at 1390. This obviously does not conflict with *Billiot* v. *Sewart Seacraft, Inc.,*

382 F. 2d 662 (5th Cir. 1967) or *Martello* v. *Hawley*, 300 F. 2d 72 (D. C. Cir. 1962) or even Rule 408 of the Federal Rules of Evidence.

Petitioner asserts that the decision below conflicts in principle with *Rose* v. *Asso. Anesthesiologists*, 501 F. 2d 806 (D. C. Cir. 1974) and *American Surety Co.* v. *Sampsell*, 327 U. S. 269 (1946) and unless revised will improperly require the federal courts to deny a full recovery to a plaintiff who enters into a pro tanto settlement. The decision below does not have this result since the court found that Petitioner had received full recovery for the $1,100,000 verdict against BCB.

III. THE DECISION OF THE COURT OF APPEALS HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner basically complains that the Court of Appeals disagreed with the trial judge on whether the evidence indicated an overlap between the $6,000,000 settlement and the $1,100,000 judgment against BCB. We submit that this does not justify the issuance of a Writ of Certiorari.

Petitioner places great emphasis on the suggestion that the District Court heard evidence *ore tenus* on the issue of credit, and that the Court of Appeals did not. Except for the oral testimony in the *VNB*, *Landmark*, and instant trials on the issue of damages, all of the evidence on credit was documentary. As to the oral testimony on damages, the District Court concluded "[t]he testimony in all three actions concerning damages was substantially the same." (Petition, p. A-13).

In finding that an overlap existed, the Court of Appeals stated:

"But this is not a case in which this court or the

> trial court needs to invent or apply a subtle rule or doubtful validity. Here there is a plain, straightforward reason to allow defendants a full credit. If the jury in this case was correct in concluding, as we must assume that it did if it followed the judge's charge, that NSL was damaged by BCB to the extent of only $1,100,000 by fraudulent conduct abetted by defendants, it follows that the Receiver has no grievance if we attribute a little more than one-sixth of the $6,000,000 which he received as a result of the March 1975 settlement, to damages caused by such fraudulent conduct. *The record proves that, measured in any way,—by time-span, by participants, by number of wrongful acts, by magnitudes of fraudulent transactions—one sixth is demonstrably a gross understatement of an appropriate attribution to that portion of the wrongdoers' fraudulent conduct abetted by defendants."*
> (emphasis supplied)

545 F. 2d at 1391.

In Section IV 3. of his argument, Petitioner asserts that more than $6,000,000 in damages were occasioned by the settling defendants prior to NSL's engagement of BCB in 1971; that more than $1,100,000 were sustained by NSL after the engagement of BCB; and that, therefore, the entire settlement should be attributed to the pre-1971 time period. These arguments are unpersuasive and should be rejected because of the procedural manner in which Petitioner chose to conduct his litigation against all the parties.

Although, as plaintiff, Petitioner had the opportunity, he elected in the *Landmark* case not to have the jury apportion damages either by time period or defendant. The same election was subsequently made in the *VNB* case and in this case. Rather, in all three actions, he elected to have the case submitted to the jury on the entire claimed loss for the whole time period, and attempted to hold each defendant liable for

such loss regardless of the contributing wrongful acts of any other party.

In the Release with the settling defendants, Petitioner, as a participating party, chose not to apportion damages either by time period or by defendant. Rather he accepted the settlement funds in release of all claims against all of the settling defendants for all time periods.

Petitioner should not now be heard to suggest that the judgment received against VNB and Landmark in their trials and the settlement payments received from VNB, Landmark, and others should be attributed solely to any particular time period or any particular defendant.

Even if Petitioner could now elect to apportion damages by time periods, although he did not do so in the first instance, any reasonable allocation would support the judgment of the Court of Appeals. Petitioner claims a loss over the entire time period of $10,800,000 (Petition, p. 10) and that $2,420,500, or 22%, occurred during the involvement of BCB (Petition, p. 6). Spreading the $6,000,000 settlement over the entire time period would allocate 22%, or $1,320,000, to the post-1971 era. The application of this credit would render the same result reached by the Court of Appeals.

A further suggestion by Petitioner is that the application of credit by the Court of Appeals will discourage future settlements. This ignores the realities of trial litigation. A defendant has incentive to settle as long as his exposure involves a risk in excess of a prior settlement. That risk is always present when the jury is permitted to consider plaintiff's full claimed loss against each of several concurrent wrongdoers, as was the case here. If a plaintiff settles his *entire* claimed loss, there is no risk to non-settling defendants; but, if a plaintiff settles less than his entire claimed loss, he is entitled to proceed further, and the risk to non-settling defendants exists.

CONCLUSION

For the foregoing reasons, Petitioner's request for the issuance of a Writ of Certiorari should be denied.

Respectfully submitted,

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